IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1355 OF 2003

IN

SUMMARY SUIT NO. 6112 of 1999

Vishnuprakash Ramniwas Kanodia .. Plaintiff

versus

M/s.Vora and Vora and others .. Defendants

...

Mr.D.D. Madon i/b S.K.Jain for the plaintiffs.

Mr.Virendra Tulzapurkar with A.A. Joshi for the defendant nos.2,4, 6 and 7.

CORAM : D.G. KARNIK,J.

DATED : 7th & 8th April 2005.

ORAL JUDGEMENT :- 7th April 2005.

1. Heard the learned counsel for the appearing

parties.

2. This motion is taken out by the original defendants 2, 4, 6 and 7 for setting aside the order dated 10th February 2003 passed in Summons for Judgement no.915 of 2001 and the consequential decree passed in the suit.

3. The plaintiff filed a Summary suit bearing no.6112/99 against the defendants alleging that the defendant no.1 was a private trust and defendant nos.2 to 5 were its trustees and defendant nos.6 to 9 were the beneficiaries. The plaintiff further pleaded that at the request of the defendant no.5 a trustee of the defendant no.1 trust, the plaintiff granted a loan of Rs.84,06,457/- to the defendant no.5 which was not repaid. The plaintiff claimed a personal decree against all the defendants for the amount of the loan and interest. In the suit, the plaintiff took out a motion, bearing no.3652 of 1999 praying for attachment before judgement of the property of the defendants. The motion was opposed inter alia by the defendant nos.2, 4 and 6. In the affidavit in reply to the motion the defendants not

only made out a case opposing the grant of an attachment before judgement but also pleaded their defence to the claim in the suit which according to them would have entitled them for an unconditional leave to defend the suit. After the affidavit in reply, the said motion was withdrawn by the plaintiff with liberty to take out a fresh motion which was never taken out. However the plaintiff took out the Summons for Judgement bearing no. 915 of 2001 which came up for hearing before a learned Single Judge of this Court on 10th February 2003. The learned Judge noted that despite service of Summons for Judgement, the defendants had not filed an application for leave to defend. The learned single Judge therefore decreed the suit applying the provisions of Order 37 Rule 3(6) of the Code of Civil Procedure, on 10th February 2003. The present motion has been taken out by the defendant nos.2, 4, 6 and 7 under Order 37 Rule 4 of the Code of Civil Procedure for setting aside of the said order and decree dated 10th February 2003.

4. Shri Tulzapurkar, the learned counsel for the defendant nos.2, 4, 6 and 7 submits that the

defendants had disclosed the entire defence to the suit in their affidavit in reply opposing the motion no.3652 of 1999 for attachment before judgement. The defendants were therefore under a bonafide impression and belief that it was not necessary for them to file any further affidavit in reply and that their reply to the motion no.3562 of 1999 would be treated as a reply to the Summons for Judgement. Their previous advocate who represented them at that time did not inform them that it was necessary for them to file an application for a leave to defend or to file a separate affidavit in reply opposing the Summons for Judgement. In the month of January 2003, the defendants decided to engage another advocate and took away the papers from the previous Advocate for engaging another advocate. It took some time to engage another advocate and in the mean while, the matter was listed on board on 10th February 2003 and an ex-parte decree was passed against them. In the circumstances, he submits that there was a just and sufficient cause for them for not remaining present personally on 10th February 2003 when their previous advocate only nominally appeared before the Court but did not advance any arguments nor pointed out the defences disclosed in their previous affidavit in

reply to the motion 3652 of 1999. In the said affidavit in reply to the motion 3652/99 filed by the defendant no.2 on behalf of the defendant nos.2, 4, 6 and 7 they had disclosed their complete defence to the suit. They had pointed out that the defendant nos.2 and 4 had resigned as trustees by two separate letters dated 2nd March 1995, their resignations were accepted by the trust by a resolution dated 1st April 1995 and therefore they had ceased to be the trustees with effect from 1st April 1995. Even otherwise, the trust stood dissolved on 16th June 1995 by reason of Clause no.20 of the deed of trust dated 17th June 1980. The plaintiffs were not only aware of the trust deed dated 17th June 1980 by and had referred to it in their plaint. The plaintiffs were therefore aware that defendant nos.2 and 4 were not the trustees of the defendant no.1 trust on the date when the loan was allegedly given to the defendant no.1 trust in August 1998. Therefore, the defendant nos.2 and 4 were not liable for the repayment. Even otherwise, as trustees, they could not be personally liable for the loan advanced to the trust but their liability was limited only to the extent of the property of the trust in their hands. He further submits that so far as defendant nos.6 and 7 were

concerned, they were only the beneficiaries under the trust and the plaintiff had claimed decree against defendant nos.6 and 7 only in their capacity as the beneficiaries of the trust. There could be no personal decree against defendant nos.6 and 7 who could only be liable to the extent of their beneficial interest in the trust. He therefore submits that the defendant nos.2, 4, 6 and 7 have a good defence to the suit on merits. This, he submits, is a special circumstance for setting aside the order and decree under Order 37 Rule 4 of the Code of Civil Procedure.

5. As regards the scope of Order 37 Rule 4 and the power of the Court to set aside an ex-parte decree passed under Order 37 of the Code of Civil Procedure, Shri Tulzapurkar relies upon the judgement of a Division Bench of this Court in Ramchandra Dhondu Dalvi versus Vithaldas Gokuldas reported in AIR 1964 Bom.251 and a recent decision of the Supreme Court in Rajni Kumar versus Suresh Kumar Malhotra reported in AIR 2003 SC 1322. In Rajni Kumar Vs. Suresh Kumar Malhotra, the Apex Court has held that the provisions of Order 9 Rule 13 of the Code of Civil Procedure do not apply in respect of a suit

filed under Order 37. Any decree passed in a summary suit under Order 37 of the Code of Civil Procedure can be set aside only under Order 37 Rule 4 of the Code of Civil Procedure if special circumstances to do so are made out. The expression "special circumstances" is not defined in the Code of Civil Procedure nor is it capable of any precise definition by the Court because problems of human being are so varied and complex. In its ordinary meaning it connotes something exceptional in character, extra ordinary, significant, uncommon. It is an anonymn of common, ordinary and general. It is neither practicable nor advisable to enumerate all the circumstances which would constitute "special circumstances". Non service of the Summons for Judgement undoubtedly would be a special circumstance. If the circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree, the Court can do so and while doing so grant a further relief of not only setting aside the ex-parte decree but granting a leave, whether conditional or unconditional, to the defendant to defend the suit. In exercise of its powers under Order 37 Rule 4, the Court is entitled not only to set aside a decree and

its execution but also grant a relief of permitting the defendant to defend the suit conditionally or unconditionally. Therefore, it is necessary that the defendant in his application for setting aside an ex-parte decree under Order 37 Rule 4 must also make out a defence of such nature to the suit as in the opinion of the Court would entitle him a leave to defend. Shri Tulzapurkar submits that affidavit in reply which was filed for opposing the motion no.3652 of 1999 for attachment before judgement itself contains the grounds of defence which would entitle the defendants for an unconditional leave to defend the suit. At this stage, it would be appropriate to consider what were the grounds of defence so taken by the defendant nos.2,4 and 6 in their affidavit in reply to the motion no.3652 of 1999.

8th April 2005.

6. As stated earlier, the suit has been filed by the plaintiff alleging that defendant no.1 is a private trust and defendant nos.2 to 5 are its trustees. The defendant nos.6 to 9 are sued as beneficiaries under the trust. Principle of law is well settled that a trustee of a private trust acting

in the capacity as such is not personally liable for the debts incurred by him in the capacity of the trustees and for the benefit of the trust but he is liable only to the extent of the property of the trust in his hands. Prima facie, therefore, the defendant nos.2 to 6 are not personally liable for the debts of the trust. According to Shri Tulzapurkar, this was a good ground on which leave to defend could and should have been granted. Furthermore, the defendant nos.6 to 9 being the beneficiaries would not be liable personally. Admittedly, defendant nos.6 to 9 had not borrowed any money. The money was borrowed by defendant no.5 purporting to act as a trustee of and for and on behalf of defendant no.1 trust. Therefore, defendant nos.6 to 9 who were the beneficiaries were not personally liable. I have perused the plaint. The plaintiff has not explained in the plaint how the defendant nos.6 to 9 would be personally liable for repayment of the debts incurred by one of the trustees purporting in the capacity as a trustee of the trust. Similarly, plaint also does not disclose how the defendant nos.2 to 5 would be personally liable for the debts incurred by the defendant no.5 in the capacity of a trustee of the defendant no.1

trust. There is no allegation that the debts were personally incurred by defendant nos.1 to 5 for their personal use. Shri Tulzapurkar is therefore right in contending that even on reading of the plaint, beruft of any defences which were raised by defendant nos.2, 4 and 6 in their affidavit in reply to the motion no.3652 of 1999, the defendants would normally have been entitled for a leave to defend so far as personal decree was claimed against them.

7. In paragraph no.1 of the plaint, the plaintiff has averred that defendant no.1 is a private family trust and that he would refer to and rely upon the trust deed when produced. This indicates that the plaintiff was aware of the existence of the trust deed and even had an access to the trust deed. Shri Tulzapurkar has handed in a compilation of documents which interalia contains a copy of the trust deed dated 17th June 1980, correctness whereof is not disputed by the learned counsel for the plaintiff. Clause no.20 of the trust deed reads thus:

> "AND IT IS HEREBY AGREED AND DECLARED that this Trust shall stand dissolved on 16th June 1995 or earlier if it is so desired by all the Trustees for the time being, but not earlier than 16th June 1988.

Clause no.20 of the Trust deed provides that the trust shall stand dissolved on 16th June 1995. Trustees had an authority to dissolve the trust earlier but not earlier than 16th June 1988. If the trust was not dissolved by the trustees between 16th June 1988 to 15th June 1995, the trust was to come to an end automatically on 16th June 1995. The defendant no.5 could, not have contracted any debts on behalf of the defendant no.1 trust after its dissolution on 16th June 1995. The suit has been filed by the plaintiff for recovery of the debt allegedly advanced by it at the request of defendant no.5 to the defendant no.1 between the period 25th August 1998 to 22nd September 1998. As the trust stood dissolved on 165th June 1995 and as the plaintiff had the knowledge thereof - the plaintiff having knowledge of the trust deed - the plaintiff could not have advanced the suit loan to the defendant no.1 Trust which was already dissolved and was non existent. In my view, this contention also raises a triable issue and on the plain averments made in the plaint and even without looking to the affidavit of the defendant nos.2,4 and 6, the defendants could have been granted leave to defend

the suit.

8. Shri Tulzapurkar, learned counsel for the defendants submits that defendant nos.2 and 4 by their two separate letters dated 2nd March 1995 had resigned the trusteeship even before the dissolution of the trust. By a resolution dated 1st April 1995, the remaining trustees had resolved to accept the resignation of defendant nos.2 and 4. The defendant nos.2 and 4 therefore ceased to be the trustee from 2nd March 1995 when they resigned and in any event with effect from 1st April 1995 when their resignation was accepted by the Trust. Therefore, submits Shri Tulzapurkar, that the defendant nos.2 and 4 could not be liable for the money borrowed by defendant no.5 as a trustee of defendant no.1 in August/September 1998. Shri Madon, learned counsel for the plaintiff submits that the letters dated 2nd March 1995, copies of which are contained in the compilation handed in by the learned counsel for the defendant are fabricated and anti-dated. He further submits that there is an intrinsic material in the letters itself which would show that the letters were anti-dated because the letters show the address of

the defendant no.5 to be "Mumbai 400 003." According to the learned counsel, the city of Bombay came to be known as "Mumbai" by an approval of the change of name notified by the Central Government in November 1995 and therefore, the word "Mumbai" could not have been used by defendant nos.2 and 4 in the letter dated 2nd March 1995. Therefore, the letters dated 2nd March 1995 must have been anti-dated. Even prior to November 1995, the Government of Maharashtra had resolved to change the name of the city from "Bombay" to "Mumbai" and only the approval of the Central government was obtained in November 1995. Use of the name "Mumbai" by the people preceded the approval by the Central Government. Therefore, merely because of the word "Mumbai" instead of the word "Bombay" was used, it cannot be said that the letters dated 2nd March 1995 have been anti-dated. Assuming that the contention of the plaintiff is accepted that the letters are anti-dated still, in any event the trust stood dissolved on 16th June 1995 and was not in existence in August 1995 when the loans are alleged to have been advanced to the defendant no.1 trust through its trustee defendant no.5.

9. Mr.Madon, learned counsel for the plaintiff,

further submits that a public notice of the alleged dissolution of the trust was issued in the Free Press Journal for the first time on 26th November 2001 and therefore, the trust must be deemed to have been continued till the year 2001. In the face of a clear provision in the trust deed that the trust would stand dissolved on 16th June 1995, it cannot be said, at this stage and without trial, that the trust continued after 16th June 1995 and in August/September 1998 when the loan was contradicted. In view of the specific contention of the defendants about the dissolution of the trust on 16th June 1995 which is supported by the trust deed, the defence which was raised by the defendants in the affidavit in reply to the Notice of Motion no.3652 of 1999 could not be said to be sham or illusory.

10. Shri Madon lastly submits that the order dated 10th February 2003 passed by this Court in Summons for Judgement no.915 of 2001 cannot be termed as an ex-parte order because Mr.N.H. Gujjar, Advocate was present on behalf of defendant nos.2, 4, 6 and 7. If the order was not ex-parte, submits learned counsel, it cannot be set aside under Order

37 Rule 4 of the Code of Civil Procedure. In Ramchandra Dhondu Dalvi Versus Vithaldas Gokuldas (Supra) a Division Bench of this Court has held otherwise. In that case, the Division Bench specifically overruled an earlier decision of a single Judge in Ramaben Bhagubhai Patel Vs. The Hindustan Electric Co.Ltd. reported in AIR 1963 Bom. 85. Therein, the learned Single Judge had held that Order 37 Rule 4 applied only to the cases where the defendant failed to appear in Summons for Judgement and was not applicable where having obtained a conditional leave to defend the defendant failed to fulfil the condition and a decree was passed against him. If in exercise of the powers under Order 37 Rule 4 of the Code of Civil Procedure, a Court can set aside a decree which is passed on account of the failure of the defendant to fulfil the condition subject to which leave had been granted, I see no reason why the Court cannot set aside a decree which has been passed when the defendant appeared but did not apply for a leave to defend or did not file an affidavit in reply thereby permitting the Court to pass a decree. It is worthwhile to note that though appearance of Mr.N.H. Gujjar is shown for defendant nos.2,4, 6 and 7 in the order dated 10th February

2003, no arguments appear to have been advanced by him. In the order dated 10th February 2003, the learned Judge states:

> "There is no reply filed by the defendants. There is also no affidavit disclosing grounds on which leave to defend can be granted. In view of the provisions of Order 37 Rule 3 of the Code of Civil Procedure, plaintiff is therefore entitled to a judgement. Heard the learned counsel for the plaintiff. Perused record. Summons for Judgement is granted"

This order shows that only the Advocate for the plaintiff was heard and Advocate for defendant nos.2, 4, 6 and 7, though present, was not heard as the defendants had not filed any affidavit in reply. Further the order itself states that it was passed under Order 37 Rule 3 of the Code of Civil Procedure on account of non filing of an application for leave to defend or an affidavit in reply. In the circumstances, the contention of the plaintiff that the motion under Order 37 Rule 4 of the Code of Civil Procedure is not maintainable has to be rejected.

11. For these reasons, I am of the view that

defendant nos.2,4, 6 and 7 have shown that they have a reasonable defence to the suit. If the defence which was raised by them in the affidavit in reply to the Motion no.3562 of 1999 is considered that would disclose that they have a reasonable defence requiring consideration. Assuming however that the Court could not have looked into the defence raised in the Notice of Motion 3652 of 1999, the very averments made in the plaint itself show that the defendants have a reasonable defence and it would be necessary to consider whether they are personally liable for the debts allegedly incurred by the defendant no.5 in the capacity as a trustee of the defendant no.1 trust which under the deed of trust had already stood dissolved.

12. In the circumstances, motion is made absolute in terms of prayer clause (a). The order dated 10th September 2003 passed in Summons for Judgement no.915 of 2001 is set aside and the defendant nos.2,4, 6 and 7 are granted unconditional leave to defend the suit.

D.G. KARNIK, J